

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Federal-State Joint Board on Universal Service

CC Docket No. 96-45

1998 Biennial Regulatory Review—Streamlined
Contributor Reporting Requirements Associated with
Administration of Telecommunications Relay Service,
North American Numbering Plan, Local Number
Portability, and Universal Service Support Mechanisms

CC Docket No. 98-171

Telecommunications Services for Individuals with
Hearing and Speech Disabilities, and the Americans
with Disabilities Act of 1990

CC Docket No. 90-571

Administration of the North American Numbering
Plan and North American Numbering Plan Cost
Recovery Contribution Factor and Fund Size

CC Docket No. 92-237
NSD File No. L-00-72

Number Resource Optimization

CC Docket No. 99-200

Telephone Number Portability

CC Docket No. 95-116

REPLY COMMENTS OF LORAL SPACE & COMMUNICATIONS LTD.

Loral Space & Communications Ltd. ("Loral") submits these reply comments in response to the Commission's NPRM in the above-referenced proceeding.¹ Loral focuses these reply comments on the international (or "eight percent") exception and encourages the Commission to adopt the proposals raised by Loral and other commenters to ensure that universal service contributions further the goals outlined in Section 254 of the Telecommunications Act of 1996 ("Act") and comply with relevant legal requirements.²

¹ See Federal-State Joint Board on Universal Service, et al., CC Dkt. Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, NSD File No. L-00-72, *Notice of Proposed Rulemaking* (rel. May 8, 2001) (FCC 01-145) ("the NPRM").

² See Texas Off. of Pub. Util. Couns. v. FCC, 183 F.3d 393 (5th Cir. 1999) ("TOPUC").

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I. THE COMMISSION'S EIGHT PERCENT INTERNATIONAL EXCEPTION FAILS TO COMPLY WITH THE ACT'S REQUIREMENTS AND THE FIFTH CIRCUIT'S RULING IN *TEXAS OFFICE OF PUBLIC UTILITY COUNSEL*.

The Commission's eight percent international exception fails to comply with the court's mandate in *TOPUC*³ and Section 254 of the Act, which authorizes the Commission to require carriers and other providers of interstate telecommunications to "contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established . . . to preserve and advance universal service."⁴

In *TOPUC*, the Court determined that the Commission's requirement that primarily international telecommunications providers contribute to the universal service fund ("USF") on the basis of both interstate and international revenues was inequitable and discriminatory when it required such providers to contribute more to the universal service fund than they generated in interstate revenues. The Fifth Circuit found that the Commission had failed to offer a reasonable explanation of how requiring such companies to "incur a loss to participate in interstate service" satisfied the "equitable" requirement of the statute.⁵ In addition, the court found the Commission's interpretation of Section 254 to be discriminatory because it "damages some international carriers . . . more than it harms others."⁶

The Fifth Circuit therefore reversed and remanded this issue. On remand, the Commission modified its regulations to adopt the eight percent rule⁷ under which a provider of

³ Id.

⁴ 47 U.S.C. § 254(d).

⁵ TOPUC, 183 F.3d at 435.

⁶ Id.

⁷ See Federal-State Joint Board on Universal Service; Access Charge Reform, 15 FCC Rcd. 1679, ¶ 19 (1999).

interstate and international telecommunications would not have to contribute based on its international end-user telecommunications revenues unless its interstate end-user telecommunications revenues exceeded eight percent of its combined international and interstate end-user telecommunications revenues.⁸ The Commission claims that this rule was designed to ensure that a provider's international revenues would be excluded from its assessable contribution base where inclusion of those revenues would result in that provider's universal service contribution exceeding the amount of its interstate end-user telecommunications revenues.⁹ The Commission found that the eight percent rule would alleviate the equitable and nondiscriminatory concerns raised by the Fifth Circuit.¹⁰

However, in practice, the eight percent international exception fails to satisfy the Act, the Commission's goals and the court's requirements and continues to be inequitable and discriminatory. As demonstrated in the comments filed by Lockheed Martin Global Telecommunications, LLC ("Lockheed Martin"), the eight percent rule continues to have a "significant disparate effect" on providers with considerable international revenues and small interstate revenues.¹¹ Indeed, as Lockheed Martin, Primus Telecommunications, Inc. ("Primus") and Loral have noted, the limited nature of the eight percent exception forces providers to choose whether to provide interstate services, which may remove them from the exception, or provide such services at an economic loss.¹² The Commission has explicitly stated that

⁸ See id.

⁹ Id.

¹⁰ Id. ¶¶ 19-23.

¹¹ Comments of Lockheed Martin at 5.

¹² "In many cases, the resulting universal service liability will eliminate any profits from the new service, and force the carrier to operate at a loss, thus creating a substantial barrier to entry and impeding competition . . ." Id. at 6; see also comments of Primus at 3; comments of Loral at 6.

telecommunications providers should not be required to make such business decisions based on their universal service obligations¹³ -- yet that is precisely what is occurring here.

Both Lockheed Martin and Primus suggest alternatives to the eight percent exception which would alleviate the concerns raised by the Fifth Circuit and satisfy the requirements of Section 254 of the Act. Specifically, they propose to exclude international revenues from the USF contribution base entirely.¹⁴ Although the Commission initially found that inclusion of international revenues in the USF contribution base was proper, the bases for that decision have since been called into question by the *TOPUC* decision. As Lockheed Martin illustrates in its comments, the Commission's inclusion of international revenues and its eight percent rule result in wildly disparate treatment among international providers.¹⁵

Alternatively, the Commission could retain a "bright-line rule," but base it on a higher, more logical threshold, such as 30 to 50 percent, to encourage primarily international providers to maintain their interstate offerings.¹⁶ Although Loral believes that the exclusion of international revenues from the USF contribution base is the proper outcome, it also supports this

¹³ Comments of Lockheed Martin at 7 & n.9 (citing Federal-State Joint Board on Universal Service, 12 FCC Rcd. 8776, 9202 (1997)). Lockheed Martin provides the example of a carrier with \$91.9 million in international revenue that would be faced with a universal service obligation of \$6.88 million if it offers an interstate service which generates \$8.1 million in revenue. The remaining \$1.2 million "would have to be enough to cover all other costs of service plus a profit in order for this fee to be equitable. Obviously a fee equal to more than 85% of gross revenues does not leave sufficient monies to make the service offering viable." *Id.* at 6-7.

¹⁴ Comments of Lockheed Martin at 8 ("[T]he Commission has discretionary statutory authority to exclude international revenues from the contribution base . . ."); comments of Primus at 4.

¹⁵ For example, Lockheed Martin notes that "a carrier with \$91.9 million of international revenue and \$8.1 million of interstate revenue would, under the eight percent rule, be required to make a contribution of approximately \$6.88 million -- in effect, a fee equal to 85% of gross interstate revenues Conversely, a carrier with \$92.1 million of international revenue and \$7.9 million of interstate revenue would be required to contribute \$543,520; a carrier with \$100 million in international revenue and no interstate revenue would pay nothing. Other than differing interstate revenue percentages -- which need not differ much at all to give rise to the distinction between contributor and noncontributor -- these classes of carriers are similarly situated and are being treated differently." Comments of Lockheed Martin at 5-6.

¹⁶ Comments of Lockheed Martin at 8; comments of Primus at 4 (proposing a 25-50 percent threshold).

latter alternative. At a minimum, the Commission must raise the eight percent exception to stay ahead of the ever-increasing contribution factor, now at almost seven percent, which may reach or exceed the eight percent threshold percentage within the next few quarters. Commenters support an increase in the international exception to stay well ahead of this curve.¹⁷ The failure to set a higher threshold will inevitably raise the same issues that caused the Commission to decide on the eight percent rule in the first place.

II. CONCLUSION

Primarily international telecommunications providers should not be penalized for or discouraged from providing interstate telecommunications. Commenters in this proceeding have shown that the current treatment of such providers discourages their entry into domestic markets, impedes competition and is contrary to the public interest. For the reasons set forth in its comments and reply comments, Loral respectfully requests that the Commission adopt rules to ensure that contributors to the universal service fund are not forced to pay more in contributions

¹⁷ See Comments of BT North America at 3; comments of BBG Communications, Inc. at 4; comments of Verestar, Inc. at 2.

than they earn in interstate revenues in order to ensure that the Commission's universal service mechanism remains specific, predictable, equitable and non-discriminatory.

Respectfully submitted,

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